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IN THE
COURT OF APPEALS OF INDIANA

JOHN A. CALDEMONE,	)	
	)	
Appellant-Petitioner,	)	
	)	
vs.	)	No. 02A03-0606-PC-231
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Respondent.	)	

APPEAL FROM THE ALLEN SUPERIOR COURT
The Honorable John F. Surbeck, Jr., Judge
Cause No. 02D04-9702-CF-118

December 29, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

NAJAM, Judge

STATEMENT OF THE CASE

John A. Caldemone brings this pro se appeal from the post-conviction court's denial of his petition for relief. He raises three issues on appeal, which we consolidate and restate as whether he was denied the effective assistance of trial counsel.

We affirm.

FACTS AND PROCEDURAL HISTORY

On direct appeal from Caldemone's conviction for Attempted Murder, a Class A felony, we stated the facts as follows:

> On February 17, 1997, Caldemone cut his step-son numerous times with a meat cleaver, causing severe injuries to his step-son. Based upon this incident, Caldemone was charged with aggravated battery and attempted murder. A jury found Caldemone guilty as charged, and Caldemone was sentenced to the Indiana Department of Correction for thirty years on the merged charge of attempted murder.
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> * * *
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> The facts most favorable to the verdict reveal that Caldemone began cutting his step-son with a meat cleaver while his step-son was asleep on the couch. The testimony further discloses that after cutting his step-son, Caldemone stated that he was tired of the things that were going on and that he had been thinking about doing this for quite some time.

Caldemone v. State, No. 02A05-9804-CR-215, slip op. at 2-3 (Ind. Ct. App. Nov. 25, 1998). We then held that the State presented sufficient evidence to prove that Caldemone acted with the specific intent to kill his step-son.

On July 19, 2000, Caldemone filed a pro se petition for post-conviction relief, alleging that he committed the attempted murder in self-defense. On January 6, 2005, Caldemone amended his petition to reflect, among other things, a claim of ineffective assistance of counsel. On May 1, 2006, the post-conviction court denied Caldemone's

petition. This appeal ensued.

DISCUSSION AND DECISION

Caldemone bore the burden of establishing the grounds for relief by a preponderance of the evidence. See Ind. Post-Conviction Rule 1(5); Timberlake v. State, 753 N.E.2d 591, 597 (Ind. 2001). Because he is now appealing from a negative judgment, to the extent his appeal turns on factual issues, Caldemone must convince this court that the evidence as a whole leads unerringly and unmistakably to a decision opposite that reached by the post-conviction court. See Timberlake, 753 N.E.2d at 597. We will disturb the decision only if the evidence is without conflict and leads only to a conclusion contrary to the result of the post-conviction court. Id.

Post-conviction procedures do not afford a petitioner with a super-appeal, and not all issues are available. Id. Rather, subsequent collateral challenges to convictions must be based on grounds enumerated in the post-conviction rules. Id. If an issue was known and available, but not raised on direct appeal, it is waived. Id. If it was raised on appeal, but decided adversely, it is res judicata. Id. If not raised on direct appeal, a claim of ineffective assistance of trial counsel is properly presented in a post-conviction proceeding. Id. A claim of ineffective assistance of appellate counsel is also an appropriate issue for post-conviction review. Id.

On appeal, Caldemone states four possible issues. First, Caldemone argues that the jury instruction on the attempted murder charge was erroneous because it failed to inform the jury that the State had the burden of defeating the "not-presented defense" of self-defense. Appellant's Brief at 17. Second, Caldemone contends that his trial counsel

was ineffective for failing to raise the issue of self-defense, for failing to object to the corresponding jury instruction, and for failing to present mitigators on his behalf. Third, Caldemone states that his appellate counsel was ineffective for failing to raise the ineffectiveness of his trial counsel. As the first issue goes to whether the purported ineffectiveness of his trial counsel prejudiced Caldemone, and the third issue is moot if Caldemone did receive the effective assistance of trial counsel, we only address a single issue: whether Caldemone was denied the effective assistance of trial counsel.[1]

A defendant claiming ineffective assistance of trial counsel must satisfy two components. Clancy v. State, 829 N.E.2d 203, 212 (Ind. Ct. App. 2005), trans. denied. "First, the defendant must show deficient performance: representation that fell below an objective standard of reasonableness, committing errors so serious that the defendant did not have the 'counsel' guaranteed by the Sixth Amendment." Id. (quoting McCary v. State, 761 N.E.2d 389, 392 (Ind.2002) (citing Strickland v. Washington, 466 U.S. 668 (1984))). Second, the defendant must show prejudice: a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. Id. Further, we afford great deference to counsel's discretion to choose strategy and tactics, and strongly presume that counsel provided adequate assistance and exercised reasonable professional judgment in all significant decisions. Id. "[U]nrealistic defenses need not be pursued by trial counsel." Schick v. State, 570 N.E.2d 918, 927 (Ind. Ct. App. 1991).

To demonstrate self-defense, a defendant must reasonably believe that he is facing an "imminent threat." Whipple v. State, 523 N.E.2d 1363, 1366-67 (Ind. 1988). Self-

[1] We disagree with the State's contention that Caldemone failed to raise this issue in his petition for post-conviction relief and has therefore waived the issue on appeal.

defense is not available when the fear of imminent threat is not objectively reasonable. Schick, 570 N.E.2d at 927. Here, because the facts revealed that Caldemone's victim was asleep when Caldemone attacked him, Caldemone could not have reasonably believed that he was facing an imminent threat. Hence, self-defense was not available to Caldemone. As such, we cannot say that his trial counsel was ineffective for not pursuing that issue, not objecting to the jury instruction, and not tendering an instruction on self-defense. See id.

In addition, Caldemone has waived any arguments that he was exposed to double jeopardy, that his trial counsel rendered ineffective assistance because "no mitigators were presented on his behalf," Appellant's Brief at 2, and that his trial counsel was ineffective for not being prepared at trial. Pro se litigants are held to the same standard as trained legal counsel and are required to follow procedural rules. Evans v. State, 809 N.E.2d 338, 344 (Ind. Ct. App. 2005), trans. denied. Here, Caldemone's double jeopardy argument was not raised either on direct appeal or in the petition for post-conviction relief. As such, it is waived. See Timberlake, 753 N.E.2d at 597. His argument regarding mitigators consists of no more than the language quoted above. And his position regarding the trial counsel's lack of preparation six days before trial says nothing about trial counsel's preparation at the time of trial. As such, on those potential arguments Caldemone has failed to present both cogent reasoning and citation to authorities. Thus, those arguments also are waived. See Ind. Appellate Rule 46(A)(8)(a); Cooper v. State, 854 N.E.2d 831, 835 (Ind. 2006).

Affirmed.

MAY, J., and MATHIAS, J., concur.